

82-1171

Supreme Court, U.S.
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No. ...

IN THE

Supreme Court of the United States

October Term, 1982

GARRISON M. EVERETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether legal impossibility is a defense to the crime of conspiracy.

2. Whether legal impossibility is a defense to the crime of conspiracy to impair, impede, and obstruct the Department of the Treasury in the "collection of tax revenue" where the government designed and participated in a "sting" operation utilizing a *fictitious* taxpayer who under no circumstance could ever be obligated to file a tax return and/or pay taxes.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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GARRISON M. EVERETT, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 15, 1982. (There are no parties to this proceeding other than the party named in the caption.)

Opinion Below.

The opinion of the Court of Appeals (App., *infra*, 1-9) is reported at 692 F.2d 596.

Jurisdiction.

The opinion of the court below affirming petitioner's conviction (Appendix, *infra*), was entered on November 15, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statute Involved.

18 U.S.C. §371 provides, in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years or both.

Statement.

Petitioner was indicted with others in the Central District of California on a one-count indictment alleging violation of 18 U.S.C. §371, conspiracy to impair, impede and obstruct the Department of the Treasury in the collection of tax revenue.

After a trial by jury, petitioner was convicted and was sentenced to three years to the custody of the Attorney General and to serve six months in a jail-type institution. The balance of the sentence was suspended and petitioner was placed on five years probation and ordered to pay a fine of \$5,000. Petitioner appealed and his conviction was affirmed.

The government's evidence at trial consisted primarily of the testimony of an undercover IRS Agent who posed as the representative of a *non-existent* wealthy resident alien who wanted to shelter 1980 and 1981 income. In March, 1981 after an initial meeting and several discussions, the Agent asked petitioner about sheltering between \$150,000 and \$180,000 that his *fictitious* client had received in taxable income for 1980. Petitioner told the Agent that he could create a tax shelter for 1980 by backdating the necessary documentation.

After further discussions, a backdating scheme was devised and documents were signed in the Agent's presence on April 16, 1981 and dated December 22, 1980. After the documents were signed, the Agent gave Petitioner \$45,000 as a down payment and lease payment in connection with the plan. Shortly after the money exchanged hands, petitioner was arrested.

REASONS FOR GRANTING THE WRIT.

A. Legal Impossibility as a Defense to Conspiracy.

This case presents a dangerous "logical" extension of the conspiracy doctrine. The warning sounded by Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949), has come to pass. Greatly troubled by the then expanding use of the conspiracy doctrine, Justice Jackson acknowledged that the history of conspiracy exemplifies the tendency of a principle to expand itself to the limit of its logic. He warned,

"... the looseness and pliability of the doctrine [referring to conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case". At 336 U.S. 445-449.

Assume on May 10, 1982, A and B entered into an agreement to kill Mr. Smith. Unknown to A and B, Mr. Smith died of a heart attack on May 9, 1982. What result?

Given the amorphous nature of the crime of conspiracy and its dragnet impact, the criminal goal or object of the conspiracy must be obtainable in order to sustain a conviction. The Fourth Circuit so holds—*Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957) (there can be no conspiracy to commit a crime when it is legally impossible to commit the underlying substantive offense). The Ninth Circuit Court of Appeals in the instant matter, the Second Circuit Court of Appeals in *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982), the First Circuit in *United States v. Waldron*, 590 F.2d 33 (1st Cir. 1979) and the Seventh Circuit in *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978) have ruled to the contrary. There presently exists a conflict in the circuits concerning this important public policy question. The same public policy considerations which

support the legal impossibility defense in the case of “attempt” equally apply to the crime of conspiracy. If anything, since less is required to convict in the case of conspiracy, the protection should be broader, not less. To say that the crime of conspiracy is a separate offense is self-serving, but does not answer the threshold question. If the substantive crime, from the outset, could not under any set of circumstances take place, the law should not convert that conduct, under the guise of a conspiracy, into a crime.

B. Standards for Establishing Legal Impossibility.

Assuming arguendo the defense of legal impossibility is available as a defense to the crime of conspiracy, what must the government prove? Here again the circuits are in serious conflict. The Second Circuit test looks at the circumstances as the defendant believes them to be. *United States v. Marin*, 513 F.2d 974 (2d Cir. 1974). The Third and Fourth Circuits focus solely on the question whether the objective acts committed by the defendant constitute a crime irrespective of the defendant’s intent. *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973); *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957). The Fifth Circuit (*United States v. Oviedo*, 525 F.2d 881 (5th Cir. 1976)) and the Ninth Circuit Court of Appeals in the instant case apply yet another standard—the acts of the defendant must strongly and unequivocally corroborate his intent to commit the crime in question.

Finally, there is yet another conflict in the circuits. Petitioner asserts there can be no conviction for conspiracy to defraud the government when the government has participated in and has knowledge of the scheme. In *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), the defendants were convicted of an attempted violation of 18 U.S.C. §1791 for smuggling letters into a federal prison without knowledge and consent of the warden. The warden in fact

knew of the letters. The Third Circuit reversed the convictions on the grounds that, since the substantive offense was not in fact committed, the defendants could not be convicted of an attempt to commit the offense. The Ninth Circuit rejected *Berrigan* in the instant case.

The sound administration of justice requires uniformity among the circuits so that citizens of the United States are treated equally. This court should address the conflict and resolve the issue.

Conclusion.

The public policy question concerning the availability of the defense of legal impossibility to the crime of conspiracy is an issue with far-reaching overtones. We are developing a system which encourages theoretical and hypothetical crimes as a substitute for the painstaking process of evolving a factual basis for conviction. Evil thought—no matter how reprehensible—should not be the subject of a prosecution. Moreover, the conflicts by and among the circuit courts of appeal should be resolved in the interest of judicial administration. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: January 12, 1983.

Respectfully submitted,

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